

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GINGER LEE ANDERSON,

Defendant-Appellant.

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UNPUBLISHED  
November 1, 2005

No. 256205  
Grand Traverse Circuit Court  
LC No. 03-009087-FH

Before: O’Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of forgery, MCL 750.248, two counts of uttering and publishing, MCL 750.249, and one count of embezzlement of \$20,000 or more, MCL 750.174(5)(a). She was sentenced to five years’ probation with one year in jail on each count. She now appeals as of right. We reverse defendant’s embezzlement conviction and sentence and remand for entry of a conviction of embezzlement of \$1,000 or more, but less than \$20,000, MCL 750.174(4)(a), and for sentencing thereon.

In her sole issue on appeal, defendant argues there was insufficient evidence to convict her of embezzlement by an agent of \$20,000 or more. We agree. In reviewing whether there was sufficient evidence to support a conviction, we review the evidence de novo, in a light most favorable to the prosecution, to determine whether a rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant argues that she never had legal possession of the funds she appropriated from a business checking account by means of forged checks and that, without those checks, there was insufficient evidence for a conviction of embezzlement. Defendant maintained the books of the business, a tanning salon, through an arrangement with the owner, Kelly Knox.

“[T]he primary difference between larceny and embezzlement is that, in . . . larceny, possession of the property is obtained unlawfully, while in embezzlement, the possession is obtained lawfully.” 26 Am Jur 2d, Embezzlement, § 10, p 349. Mere access to the property is not enough for embezzlement. The property in question must have been in a defendant’s possession lawfully. *Id.* Possession can be either actual or constructive, but “even constructive possession of property requires an intent and capability to maintain control and dominion over it.” 26 Am Jur 2d, Embezzlement, § 23, p 359.

In this case, defendant was charged with embezzlement under MCL 750.174(5)(a), which makes an agent who embezzles money or personal property with a value of \$20,000 or more guilty of a felony. MCL 750.174 reads:

(1) A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use without the consent of his or her principal, any money or other personal property of his or her principal that has come to that person's possession or that is under his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement.

From this statute, this Court has defined the elements of embezzlement by an agent as:

(1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal. [*People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

Additionally, for MCL 750.174(5)(a), there is one more element by the plain language of the statute—the prosecution must prove \$20,000 or more worth of money or personal property was embezzled. This additional element and element three, which requires a defendant to have had lawful possession of property that was embezzled, are what defendant challenges in this appeal.

First, there is the issue of the signed, but blank, checks. On occasion, Knox gave defendant blank checks to cover payments (such as credit card bills or taxes) that were due soon, but were not calculable as to exact amounts in advance. This allowed defendant to work on the books late into the night, at home, where she could determine the amounts required, fill them in, and then get the checks into the mail the next day. Thus, defendant received these signed, blank checks as a result of her position as an agent for Knox's business. Knox gave them to defendant out of their relationship of trust. By giving blank checks to defendant, Knox gave constructive, legal possession of the funds in the bank account accessed by those checks to her. Therefore, defendant, through her position of trust, did have legal possession of the funds in Knox's business checking account in connection with the signed, blank checks. The third element of embezzlement is therefore met for the signed, blank checks that defendant used to transfer money to herself. But those checks only added up to \$8,205.99, which is insufficient to meet the other element of the charged offense of embezzlement by an agent of \$20,000 or more—a finding of at least \$20,000 of converted funds and personal property. The second issue—whether the forged checks satisfied element three of embezzlement—is thus dispositive.

Accessing bank account funds through forged checks is very different from using a signed, blank check to access a bank account. In the latter case, the funds are legally accessed

because there is a valid signature of an accountholder. But in the former case, the funds were not lawfully accessed because there was not a valid, authorizing signature.

Defendant was not an authorized user of Knox's business checking account with regard to the forged checks. The only time she was able to legitimately sign Knox's name to a check was for emergencies that Knox individually authorized as they occurred. On all other occasions, when she needed to fill out checks on that account, she was required to obtain Knox's signature. Thus, defendant did not have control or dominion over the money contained in Knox's business checking account. She did not have rightful, legal possession of that money (outside of the times she had used blank checks pre-signed by Knox to access the account). Even though she was acting as the business' bookkeeper, she was never entrusted with general access to its checking account. Therefore, for those funds defendant accessed by forging Knox's signature, defendant did not meet the third element of embezzlement, lawful possession of the funds or property embezzled. This leaves only \$8,205.99 worth of checks in evidence to support defendant's embezzlement conviction. Thus, taken in the light most favorable to the prosecution, there was insufficient evidence to convict defendant of embezzlement by an agent of \$20,000 or more.

The case of *People v Burns*, 242 Mich 345; 218 NW 704 (1928), which is cited by the prosecutor, does not alter this conclusion. The issue in that case was not whether forged checks gave constructive possession, but was instead whether a lack of official authority for a given employee to receive money is a defense to embezzlement when, as an employee, the defendant accepts money and then appropriates it. *Id.* at 348. In *Burns*, a probation officer argued that he could not be convicted of embezzlement because his job as a probation officer did not authorize him to handle and disburse the money at issue. *Id.* Our Supreme Court held that it did not matter whether or not he was officially authorized to handle that money. The fact that, by virtue of his office, he was given funds that he consented to receive and disburse gave him rightful possession. *Id.*

Defendant's situation is different. With regard to the forged checks, she was not given, and did not accept, money from Knox's account to distribute, either officially or unofficially. The *Burns* case is, therefore, inapplicable to the facts in this case.

For these reasons, we conclude that there was insufficient evidence for a conviction of embezzlement over \$20,000. This leaves the question of the appropriate remedy. At oral argument, defendant conceded that, because there was sufficient evidence to establish an embezzlement of \$1,000 or more, but less than \$20,000, MCL 750.174(4)(a), remand for entry of conviction and sentencing on that offense is appropriate. See *People v Randolph*, 466 Mich 532, 552-553; 648 NW2d 164 (2002).

Defendant's conviction for embezzlement of \$20,000 or more is reversed and the matter is remanded to the trial court with instructions to enter a conviction for embezzlement of \$1,000 or more, but less than \$20,000, MCL 750.174(4)(a), and to sentence defendant thereon. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ David H. Sawyer  
/s/ William B. Murphy